

January 24, 2003

COMPETITIVE ENERGY SERVICES, LLC (CES)      ORDER  
Request for Commission Investigation Regarding  
The Waterfall of Customer Payments Under  
Chapter 322

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WELCH, Chairman; NUGENT and DIAMOND, Commissioners

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## **I. SUMMARY**

We decline to open a formal investigation or rulemaking to adopt the “Credit Assurance Program” as proposed by Competitive Energy Services, LLC (CES) for competitive electricity providers (CEPs). We also decline to open a rulemaking to formally consider a proposed rule as suggested by CES that would modify the partial payment provision of Chapter 322 that governs customer payments when utilities are billing for CEP service.

## **II. BACKGROUND**

When a transmission and distribution (T&D) utility bills both for utility service and CEP service, and a customer’s payment is less than the total amount due, Chapter 322 directs the T&D utility to allocate such partial payments in the following order:

1. Past due transmission and distribution and standard offer charges with the oldest charge paid first. When transmission and distribution charges and standard offer charges are of the same age, the transmission and distribution charge shall be paid first.
2. Past due competitive electricity provider charges with the oldest charge paid first.
3. Current transmission and distribution charges.
4. Current standard offer charges.
5. Current competitive electricity provider charges.

Chapter 322, § C(1).

On September 10, 2002, CES filed a request that the Commission consider modifying the partial payment provision of Chapter 322. CES cited a “loop-hole” in the rule that permits a customer to continue electricity service despite the fact that the customer systematically does not pay its CEP bill. The “loop-hole” is created when a consolidated-billing customer maintains an outstanding balance with the T&D utility for one month. If the customer makes a

partial payment of exactly the past due T&D amount, no payment is ever allocated to the CEP, yet by always paying the past due T&D amount, the customer is not disconnected. CES stated that a CEPs' only recourse is to cancel contracts. Because the customers can automatically revert to standard offer and retain electric service, CES says the CEP has no chance of recovering its money. CES concludes that this is an unfair result. Moreover, CES explains, its concern is not merely an academic one. Two of its customers had discovered this loop-hole and, at the time of filing, owed the supplier about \$40,000.

CES asked the Commission to consider a "simple adjustment" to Chapter 322, so that partial payments are applied to oldest past due amounts first. The T&D, standard offer provider, CEP priority would be retained for past due amounts of identical age, and for current amounts due. CES warns that if the "loop-hole" becomes common knowledge, the competitive market in Maine will be seriously damaged, as suppliers will be reluctant to provide service.

On September 27, 2002, the Commission provided notice of CES's request and invited comments from interested persons. Central Maine Power Company (CMP), Bangor Hydro-Electric Company (BHE) and Maine Public Service (MPS) filed comments. All three T&D utilities opposed changing Chapter 322 as suggested by CES. Both CMP and BHE pointed out that the CES proposal was adopted by the Commission in an earlier version of Chapter 322. When implementing the earlier version of Chapter 322, CMP and BHE asked for a waiver of Chapter 810 so that the utility notices of disconnection could include the past due CEP amounts which in effect would have to be paid to avoid disconnection of T&D service. CEP service is non-utility service, and Chapter 810 prohibits disconnection notices from including amounts due for non-utility service. The Commission denied the Chapter 810 waiver requests because inclusion of the CEP charges on the disconnection notice was contrary to 35-A M.R.S.A. § 3203 (14), which prohibits a T&D utility from disconnecting a customer for non-payment of generation service.

The waiver requests revealed a problem with the then existing partial payment rules. These rules violated the spirit, if not the letter, of the statutory prohibition of disconnection for non-payment of generation service because generation service bills must be paid to avoid disconnection of T&D service. As a result the Commission initiated a rulemaking and amended Chapter 322 to its current partial payment allocation provisions. Partial payments are first allocated to all T&D and standard offer past due amounts (thereby avoiding disconnection), then allocated to past due CEP amounts, and then allocated to current due amounts, in the same order, T&D first, standard offer providers second and CEP last.<sup>1</sup>

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<sup>1</sup> In addition to the statutory prohibition, CMP and BHE put forth policy justifications for rejecting the CES proposal and continuing to allocate payments first to T&D utilities.

On October 28, 2002, CES filed responsive comments. In addition, CES requested that the Commission expand this investigation and consider a new proposal CES named its "Credit Assurance Program." The Credit Assurance Program is needed, according to CES, to reduce an increasingly important electricity market inefficiency involving CEP-customer credit.

Under the Credit Assurance Program, CES proposed to offer CEPs the same approach to uncollectibles as Chapter 301 currently provides to standard offer providers: a CEP would be able to choose to have the T&D utility assume the risks associated with non-payment of the total electric bill and the utility would be compensated through receipt of a pre-determined uncollectible adder.

CES asserted that credit issues concerning retail electricity customers have become a hindrance to the continued development of a competitive retail electricity market. CES stated that these credit issues arise in reaction to the Enron collapse and the fragile financial position of many of the remaining suppliers. As a result, suppliers have rejected prospective customers for credit reasons at a markedly increased rate. Even for those customers ultimately approved, credit reviews have become longer and more complex, leading to increases in transaction time and costs. CES asserted that price increases to compensate for perceived increased credit risk, and credit enhancements, like deposits or pre-payments, effectively are not available to solve this credit crisis because standard offer service is available without credit enhancements and at a price without credit risk. In addition, because of the "newness" of the retail electricity market, there is not yet any "insurance for receivables" product that suppliers could get to cover their risk. In CES's view, this credit crisis threatens the continued successful development of the retail electricity market in Maine.

CES stated that its initial proposal, concerning the allocation of partial payments, addresses one aspect of the credit crisis but does not address the full scope of problems created by the credit crisis. CES proposed the Credit Assurance Program as a preferred and more comprehensive solution. The program, in CES's view, will reduce customer acquisition and contracting costs for CEPs and eliminate a major barrier that prevents CEPs from effectively competing with the standard offer.

As CES's responsive comments raised new issues and proposed a significantly expanded rule change, the Commission again sought comments from interested persons. CMP and BHE provided comments, as did Houlton Water Company. All three T&D utilities strongly opposed the Credit Assurance Program, for essentially the same reasons.

First, the T&D utilities argue that the program is not permitted because of 35-A M.R.S.A. § 3203(14), which prohibits a utility from disconnecting service to a customer for nonpayment of generation service. Assigning CEP receivables to

the T&D utility would put it in the untenable position of being unable to terminate CEP service (because it is not the party providing that service) or to disconnect delivery service when a CEP customer does not pay its CEP bill (which would violate section 3202(14)). Neither option is acceptable, in the T&D utilities' view.

Second, the T&D utilities assert that credit and receivables management are aspects of competitive service upon which providers should compete. Socialization of these risks, as proposed by CES, would deny customers and providers of some of the benefits competition should produce. It would be bad public policy, the T&D's argue, to make CEP's indifferent to the credit worthiness of their customers, and unfair to customers with good credit to socialize credit management costs.

Lastly, the T&D utilities assert the program violates a basic principle of the Restructuring Act: it imposes a financial interest in the generation business upon the T&D utilities.

### III. DECISION

We appreciate the efforts made by CES to bring its proposals to the Commission. We rely on such input from participants in the retail market to guide our decision-making involving electric restructuring. However, after careful consideration, we decline to open an investigation or a rulemaking to implement the proposals presented by CES. We address the two proposals separately.<sup>2</sup>

#### The Credit Assurance Program

We agree with the T&D utilities that the Credit Assurance Program is both prohibited by 35-A M.R.S.A. § 3203(14) and an unwise policy that runs counter to the goals of electric restructuring.

Section 3203(14) prohibits disconnection due to nonpayment of generation charges. However, CEP receivables, if assigned to a T&D utility, would logically be no different than any other utility charge. Disconnection, after following various procedural safeguards, is of course allowed for non-payment of utility charges. If the Credit Assurance Program is intended to permit disconnections for CEP receivables, turned into T&D receivables, then we conclude the program is prohibited by section 3202(14).

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<sup>2</sup> CES suggested a third proposal that it described as "not an attractive option." The third proposal involved equalizing credit requirements among CEPs and standard offer providers by exposing standard offer providers to the actual bad debt risk. The Commission found such an approach "not practical" in our recent *Standard Offer Study and Recommendations Regarding Standard Offer Service*, at 17-18, (December 1, 2002), prepared at the direction of and delivered to the Legislature on November 27, 2002.

If the Credit Assurance Program is not intended to permit disconnection for non-payment of CEP charges, then the program is unworkable. The T&D utility, although not receiving payment for CEP charges, cannot disconnect T&D service. The CEP will not terminate CEP service, because the CEP is paid for its service by the T&D utility. The Credit Assurance Program therefore is workable only if operated in a manner that is currently prohibited by statute.

Even if we expand the scope of this inquiry into whether, assuming the Legislature amended section 3202(14), the Commission should adopt the Credit Assurance Program, we conclude that we should not. We agree with the T&D utilities that competitive suppliers may be able to add value by their credit and receivables management to the benefit of their customers. To the extent we "socialize" those costs, we will restrict the benefits that might be achieved by subjecting generation service to competition. If a competitive market is to develop properly, we must permit the market to assess all the risks, credit and otherwise. We are not convinced that we should intervene to socialize credit costs faced by CEPs.

The real hindrance, in CES's view, is that standard offer service is readily available to customers without credit requirements because standard offer service does socialize its credit management costs and bad debt. We share CES's concerns that standard offer service should not inhibit the development of the competitive generation market in this (or any other) regard. We believe, however, that we can address these concerns at least to some extent without removing credit management from the services offered by CEPs or otherwise intervening in the competitive market. CEP and standard offer service will not be identical in this regard, nor are the services identical in other regards. For example, as standard offer prices for medium and large customers change more frequently to follow market changes, CEP service may become increasingly attractive to customers that desire fixed prices for longer term periods.

In our recent study for the Legislature, *Standard Offer Study and Recommendations Regarding Service after March 1, 2005*, (December 1, 2002), we discussed various means to accomplish a transition of "standard offer" to "last resort" type service, such as indexed prices, and shorter-term standard offer provider contracts. December 1, 2002 Study at 15-18. We expect to open an investigation to consider such changes early next year, and to implement changes after the investigation. As we implement such changes to make standard offer service a "last resort" service, we expect that standard offer service will no longer be an adequate substitute for competitive generation service (at least in most cases) regardless of the different credit treatment offered to standard offer customers.

In addition, we can adjust the credit and collection requirements we impose on standard offer customers so that those requirements are more similar to those faced in the retail market. In our December 1, 2002 Study, we also

committed to consider whether our rules should be revised to give utilities greater flexibility to require credit assurances for standard offer service that resembles the credit assurances in the competitive market.

### Chapter 322 Partial Payment Allocation

CES disagrees with the T&D utilities that its proposed amendment to Chapter 322's partial payment allocation provision is prohibited by 35-A M.R.S.A. § 3203(14). In CES's view, the prohibition on disconnection was not intended to interfere with the "normal" accounting practice of allocating payments between two accounts to the oldest debt first.

We are not certain that the proposed partial payment allocation provision is "normal" accounting. In any case, we conclude that the spirit, if not the letter, of section 3203(14) prohibits our adoption of CES's proposed amendment to the partial payment provisions. Under the CES proposal, as long as a customer has CEP bills in arrears by more than one month, the customer will avoid disconnection only by paying his CEP bills that are older than his most recent past due T&D payment. Only by paying all of his older CEP bills will the customer be able to pay off his most recent, but still overdue T&D bill. Thus, disconnection could occur for non-payment of generation charges as well as T&D charges.

Even if we believed that the statutory interpretation question could be resolved in CES's favor, there would be practical problems with CES's proposed partial payment provisions that would lead us to reject them. In CES's view, partial payments should be allocated to CEPs unless there is a dispute between a CEP and the customer. This seems logical, but the potential for disputes reveals significant administrative problems with CES's proposal. In the utility service context, a customer cannot be disconnected while a dispute exists. Importantly, our Consumer Assistance Division (CAD) is authorized to resolve the dispute, and to authorize the disconnection if the utility prevails. When utility service is in question, the dispute must concern application of Maine law, Commission rules or utility rate schedules or terms and conditions, all of which are approved by the Commission.<sup>3</sup> Under these circumstances CAD is competent to review the matter and to resolve the dispute. In addition, there is a process in place for the customer or utility to appeal to the Commission to challenge CAD's resolution of the dispute.

Under the CES proposed rule amendment, partial payments would not be allocated to CEP charges if the CEP charges were "disputed." Presumably, until the dispute was resolved, disconnection could not occur. But how could CAD resolve a CEP-customer dispute? How could CAD even verify that a dispute

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<sup>3</sup> Laws of course are not approved by the Commission but merely implemented.

exists? Even if CAD were presented with contracts or terms and conditions, the CAD does not have an authority to resolve CEP contract disputes. CEP service matters cannot be effectively managed by our CAD, and the CAD process is an integral part of the disconnection process. It seems clear to us that the CAD dispute process and our disconnection rules and process must be restricted to matters involving utility service. Therefore, in a consolidated billing context, partial payment first should be allocated for past due charges entirely to T&D charges before such payments are allocated to CEP charges.<sup>4</sup>

Dated at Augusta, Maine this 24<sup>th</sup> day of January, 2003.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl  
Administrative Director

COMMISSIONERS VOTING FOR:      Welch  
   Nugent  
   Diamond

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<sup>4</sup> We note that the New York General Assembly recently adopted a different approach than the Maine Legislature. New York passed a law that allows T&D utilities to disconnect customers for nonpayment of CEP bills, while at the same time subjecting CEPs to the full panoply of New York PSC consumer rules, just like the utilities. 2002 N.Y. LAWS, Chapter 686 (The Energy Consumer Protection Act of 2002).

## NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.
2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.
3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.

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